ENESTY SDN BHD

v.

KETUA PENGARAH JABATAN HASIL DALAM NEGERI

COURT OF APPEAL, KUALA LUMPUR
MOKHTAR SIDIN JCA
MOHD SAARI YUSOFF JCA
ABDUL AZIZ MOHAMAD JCA
[CIVIL APPEAL NO: W-01-270-1996]
12 MAY 2003

REVENUE LAW: *Income tax - Assessment - Act of making assessment - Whether must involve formality and deliberateness - Providing tax computations - Finding of no chargeable income - Whether amounted to making assessment - Income Tax Act 1967, ss. 42, 77, 90(1), 93, 96(1), 99(1)*

The appellants were seeking to appeal to the Special Commissioner against the respondent's decision in the matter of the annual allowances allowable for its qualifying plant expenditure incurred from January 1981 to December 1985. Section 99(1) of the Income Tax Act 1967 ('the Act') stipulates, however, that such an appeal could only lie against an assessment, and that being so the appellants requested the respondent to issue notices of assessments in respect of the years 1982, 1983 and 1984 ('the said years'). The respondent refused to oblige, contending that assessments thereof could not be made as the appellants had no chargeable income in respect of the said years. The refusal notwithstanding, by letter dated 1 December 1988, the respondent produced tax computations in respect of the said years showing nil chargeable income for the period. Dissatisfied, the appellants applied for an order of mandamus to direct the respondent to issue and serve on them notices of assessment for the said years, arguing, in essence, that the respondent, in preparing the tax computations, must have made assessments for the said years, and was hence duty bound under s. 96(1) of the Act to issue notices of assessment thereof. The argument however was rejected by the learned judge ruling, on the basis of s. 93 of the Act, that the respondent had not made assessments for the relevant years. The appellants appealed and the issue that arose was whether any work or exercise done by the respondent by which he was enabled to know whether or not a person had a chargeable income, such as the preparation of the tax computations herein, must amount to making an assessment.

Held:
Per Abdul Aziz Mohamad JCA

[1] The issue here was not whether the respondent had failed in his duty to make an assessment and to issue such notices of assessment to the appellants, as stated by the learned judge. Rather the issue was whether the appellants were right in contending that the respondent had made assessments. If they were, then the respondent was bound by s. 96(1) to cause notices of assessment to be served on the appellants and mandamus would lie to compel the respondent to discharge his duty. If not, there was no case for demanding service of notices of assessment. (p 16 a-b)

[2] Whether s. 90(1) of the Act makes it mandatory that an assessment be made in the case of each person who has delivered a return under s. 77 is a matter of construction of the section. In any case, the language of the section is not so clear as to deny admission to the perfectly reasonable implication that an assessment is not required if there is no chargeable income. (pp 16 h-i & 17 b-c)

[3] Under s. 93 of the Act, the making of an assessment would involve formality, ritual and deliberateness. The prescribed form must be used and the date on which the form is duly completed must be specified in the appropriate space in the form. The date is important as it indicates the date on which the assessment must be presumed to have been made. Any other determination as to chargeable income or tax liability made in some other medium or for some purpose other than for completion of the assessment form or made before that date, is not or is not yet the making of an assessment. (p 20 f-g)

[3a] In view of s. 93 and of the fact that no question arose before this court that assessment forms had been completed for the three years of assessment in question, we would agree with the learned judge that no assessments had been made in respect of those years. It follows that the respondent was under no duty under s. 96(1) to have notices of assessment served on the appellants. (p 21 a-b)

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation of Headnotes*

Perayu berhasrat untuk merayu kepada Pesuruhjaya Khas terhadap keputusan responden berhubung soal elaun tahunan yang boleh diberikan ke atas 'qualifying plant expenditure' yang dibelanjakannya dari Januari 1981 hingga Disember 1985. Seksyen 99(1) Akta Cukai Pendapatan 1967 ('Akta') bagaimanapun memperuntukkan bahawa rayuan berkenaan hanya boleh dibuat terhadap suatu penilaian, dan berikutnya perayu memohon supaya responden mengeluarkan notis-notis penilaian bagi tahun-tahun 1982, 1983 dan 1984 ('tahun-tahun tersebut'). Responden enggan berbuat demikian atas alasan bahawa penilaian tidak dapat dibuat kerana perayu tiada apa-apa pendapatan bercukai bagi tahun-tahun tersebut. Walaupun begitu, melalui surat bertarikh 1 Disember 1988, responden mengemukakan laporan pengiraan cukai bagi tahun-tahun tersebut, yang menunjukkan pendapatan bercukai yang kosong bagi tempoh berkenaan. Merasa tidak puas hati, perayu memohon untuk perintah mandamus bagi mengarahkan responden bagi mengeluar dan menyerahkan kepada perayu notis-notis penilaian bagi tahun-tahun tersebut, sambil berhujah, secara intinya, bahawa responden, sewaktu menyediakan laporan pengiraan cukai, semestinya telah membuat penilaian bagi tahun-tahun tersebut, dan dengan itu bertanggunggan di bawah s. 96(1) Akta untuk mengeluarkan notis-notis penilaian baginya. Hujah ini bagaimanapun ditolak oleh hakim yang bijaksana, yang memutuskan bahawa responden tidak boleh dikatakan sebagai telah membuat penilaian bagi tahun-tahun tersebut, mengambilkira peruntukan s. 93 Akta. Perayu merayu dan isu yang berbangkit adalah sama ada apa jua tindakan yang diambil oleh responden bagi membolehkannya mengetahui sama ada seseorang itu mempunyai pendapatan bercukai ataupun tidak, seperti penyediaan laporan pengiraan cukai di sini, semestinya merupakan suatu perbuatan penilaian.

Diputuskan:
Oleh Abdul Aziz Mohamad HMR

[1] Isu di sini bukanlah sama ada responden gagal dalam kewajipannya untuk membuat penilaian dan mengeluarkan notis-notis penilaian berkaitan kepada perayu, sebagaimana yang ditegaskan oleh hakim yang bijaksana. Isunya adalah sama ada perayu betul dalam hujah mereka bahawa responden sebenarnya telah pun membuat penilaian. Jika mereka betul, maka responden adalah berkewajipan di bawah s. 96(1) untuk menyerahkan notis-notis penilaian kepada perayu dan mandamus harus dibenarkan bagi memaksa responden menjalankan tanggungjawabnya. Jika tidak, tuntutan supaya notis-notis penilaian dikeluarkan adalah tidak beralasan.

[2] Sama ada s. 90(1) Akta mewajibkan responden membuat penilaian bagi setiap kes di mana seseorang telah mengembalikan borang isiannya di bawah s. 77 adalah suatu perkara pentafsiran seksyen tersebut. Namun, bahasa seksyen ini tidaklah sebegitu jelas sehingga membolehkan kita untuk tidak menerima implikasi yang amat munasabah bahawa penilaian adalah tidak perlu jika tidak ada pendapatan bercukai.

[3] Di bawah s. 93 Akta, membuat penilaian akan melibatkan formaliti, ritual dan perbuatan-perbuatan lain. Borang yang sah harus digunakan dan tarikh di mana borang tersebut sempurna diisi hendaklah dicatit pada ruang yang dikhaskan baginya. Tarikh ini adalah mustahak kerana ia menunjukkan masa sebenar penilaian dianggap sebagai telah dibuat. Mana-mana cara lain bagi memutuskan soal pendapatan bercukai atau tanggunggan cukai atau yang dibuat melalui medium atau untuk tujuan-tujuan lain selain dari penyempurnaan pengisian borang penilaian atau yang dibuat sebelum tarikh yang tercatit disitu, bukanlah atau belum lagi merupakan satu perbuatan penilaian.

[3a] Mengambilkira s. 93 serta fakta bahawa tiada persoalan dibangkitkan di mahkamah ini bahawa borang-borang penilaian bagi tahun-tahun tersebut telah sempurna diisi, maka kami bersetuju dengan hakim yang bijaksana bahawa tiada penilaian dibuat bagi tempoh tersebut. Ianya mengikut bahawa tiada kewajipan bagi responden untuk menyerahkan notis-notis penilaian kepada perayu di bawah s. 96(1) Akta.

Rayuan ditolak.]

Case(s) referred to:

Lloyds Bank Export Finance Ltd v. Commissioner of Inland Revenue [1991] STC 474 ***(dist)***

The King v. The Deputy Federal Commissioner of Taxation for South Australia, ex p Hooper [1926] 37 CLR 368 ***(refd)***

Legislation referred to:

Income Tax Act 1967, ss. 19, 25, 42, 77, 90(1), 93, 96(1), 99(1), paras 14, 15 of schedule 3

Income Tax (Qualifying Plant Annual Allowances) Rules 1982, r. 2

Rules of the High Court 1980, O. 53 r. 3(2)

Income Tax Act 1976 [New Zealand], ss. 19, 25

Income Tax Assessment Act 1922-1924 [Aust], s. 35

Land and Income Tax Act 1954, ss. 17, 24

For the appellants - KI Goh; M/s Shearn Delamore & Co

For the respondent - Raja Kamarulzaman Raja Musa (Zaleha Adam)

[Appeal from High Court, Kuala Lumpur; Originating Motion No: R8-25-64-1990]

Reported by WA Sharif

a

JUDGMENT

Abdul Aziz Mohamad JCA:

This was an appeal from the High Court's refusal of an order of mandamus to direct the respondent to issue and serve on the appellant company notices of assessment for years of assessment 1982, 1983 and 1984.

b

According to s. 42 of the Income Tax Act 1967, the statutory income of a person from a source consists of the amount of his adjusted income from that source plus the amount of certain charges falling to be made in relation to that source and then reduced by the amount of certain allowances falling to be made in relation to that source. One of the allowances is set out in para. 15 of Schedule 3 to the Act. It is an allowance for certain plant expenditure. It is known as an annual allowance (para. 14, Schedule 3). The allowance is a proportion of the expenditure. The proportion is prescribed by rules. The first rules were the Income Tax (Qualifying Plant Annual Allowances) Rules 1968 (P.U.154/68), now revoked by the 2000 Rules (P.U.(A) 52/2000). The proportions, or rates as they were termed there, were set out in the Schedule to the 1968 rules. The Schedule was completely substituted by an amendment in 1980 (P.U.(A) 346/1980), the new Schedule becoming the Schedule to the 1968 Rules. In 1982 came the Income Tax (Qualifying Plant Annual Allowances) Rules 1982 (P.U.(A) 74/1982) which were to have effect in respect of qualifying plant expenditure incurred from 1 January 1981 to 3 December 1985. The effect of r. 2 was to apply to the qualifying plant expenditure of a person for that period, for the purpose of determining the annual allowances, a rate specially formulated in that rule (which rate we need not set out), "unless he elects in writing, when claiming an annual allowance for that year in respect of that expenditure, that the allowance be equal to the rates prescribed in the (1968 Rules)".

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In the returns that the appellants furnished the respondent under s. 77 of the Act for the years of assessment 1982, 1983 and 1984, the appellants did not make that election, although presumably they did claim the annual allowances. So the consequence was that the rate specially formulated in r. 2 of the 1982 rales would be applied.

g

According to the respondent, no assessment was made for those years because the appellants had no chargeable income.

h

A couple of years later, the appellants, through their tax agents, commenced efforts to have the 1968 rates applied for those years. The efforts apparently started with a letter of the appellants' tax agents dated 27 January 1987. The respondent refused to apply the rates of the 1968 rules.

i

Being dissatisfied with the respondent's decision in the matter of the rates for the annual allowances, the appellants wished to appeal to the Special Commissioner but they found that according to s. 99(1) an appeal to the Special Commissioner could only lie against, and therefore required, an assessment. So on 9 August 1988 the appellants' tax agents requested the respondent to issue notices of assessment under s. 96(1) for those years. (According to that section, the respondent is required to serve a notice of assessment on the person concerned as soon as assessment has been made). The respondent replied on 28 September 1988 that he could not issue notices of assessment because the appellants had no chargeable income to assess income tax on, but he would produce tax computations for those years. These were furnished in a letter dated 1 December 1988. They showed nil chargeable income for 1983 and 1984 and did not show any chargeable income for 1982.

According to the statement under O. 53 r. 3(2) of the Rules of the High Court 1980 that went in support of the appellants' application for leave to apply for mandamus, it was not the appellants' case that the respondent had not made assessments for the years 1982, 1983 and 1984. The appellants' case, as was evident to us from sub-para. (i) of para. 3 of the statement, was that assessments had been made for those years, and since they had been made the respondent was bound by s. 96(1) to cause notices of assessment to be served on them. Hence the appellants' prayer was for an order that notices of assessment for those years be issued and served and not also for an order that assessments be made. Now as to what grounds the appellants had for contending that assessments had been made and bringing their application on that footing, this we could see from sub-paras. (g) and (h) of para. 3 of the statement. They were deductive paragraphs where the premise was the fact that the respondent had, as stated in his aforesaid letter dated 28 September 1988, found that the appellants had no chargeable income and had prepared the tax computations that were given in his letter dated 1 December 1988. From that premise the appellants made the inference that the respondent must have made assessments. The inference that the respondent must have made assessments was, in sub-para. (i) of para. 3, upgraded or equated to the insistence that assessments had been made.

In his grounds of decision, the learned judge, at p. 5, said: "The issue therefore, is whether the respondent had failed in its duty in the circumstances to make an assessment and to issue such notices of assessment to the applicant". That statement we thought was not correct as regards failure in duty to make assessments. Since according to the appellants' statement their case was that the respondent had made assessments and therefore must, as required by

s. 96(1), issue notices of assessment, there could not have been an issue whether the respondent had failed to make assessments. An issue that the respondent had failed in his duty to make assessments could only have sprung from the appellants, and no such issue could have so sprung as the appellants themselves insisted that assessments had been made. The issue was rather whether the appellants were right in contending that the respondent had made assessments. If they were, then the respondent was bound by s. 96(1) to cause notices of assessment to be served on the appellants and mandamus would lie to compel the respondent to discharge his duty. If not, there was no case for demanding service of notices of assessment.

Although in sub-para. (f) of para. 3 of the statement it was contended that s. 90(1) required the respondent to make an assessment in any event where a person has delivered the return required by s. 77, it was not, as we have said, the appellants' case that the respondent had not made assessments. That contention was made by way of support for the contention that assessments had been made. In other words, it was as though the case of the appellants was that because of the factual premise that we have stated and also because s. 90(1) required that in any event assessments be made, assessments must have been, and were in fact, made.

Section 90(1) is as follows:

> (1) Where a person has delivered a return under section 77 to the Director General for a year of assessment, the Director General may:
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> (a) accept the return and make an assessment accordingly, or
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> (b) refuse to accept the return and, according to the best of his judgment, determine the amount of the chargeable income of that person for that year and make an assessment accordingly.

As to whether s. 90(1) imposes a duty on the respondent to make an assessment in every case of a person who has delivered a return under s. 77, the learned judge was of the view that s. 90(1) does not do so and that since an assessment is not to determine chargeable income but to determine the tax payable on the chargeable income, and since the precondition for making an assessment is the determination of the amount of chargeable income, then if there is no chargeable income, there can be no tax and no assessment is required.

Whether s. 90(1) makes it mandatory that an assessment be made in the case of each person who has delivered a return under s. 77 is a matter of construction of the section. It was not difficult to see the appellants concluding from the alternative courses provided by paras. (a) and (b), each of which

courses ends with the making of an assessment, that there is no choice for the respondent but to make an assessment. We were inclined to view the alternative courses as emphasising that the respondent has in every case to determine, either from the information given in the return or by using the respondent's own judgment, whether the person concerned has a chargeable income and what is its amount, and then to make an assessment of the tax payable, the implication being that an assessment has to be made only if there is chargeable income to levy tax upon. To us the language of the section is not so clear as to deny admission to the perfectly reasonable implication that an assessment is not required if there is no chargeable income.

Having disposed of the effect of s. 90(1), we revert to what, going by the statement, was virtually the only issue in this case, that is whether assessments had been made for the years of assessment 1982, 1983 and 1984. The appellants maintained that assessments had been made and they concluded that from the factual premise stated earlier. To repeat, their stand was that for the respondent to state in their letter of 28 September 1988 that the appellants had no chargeable income and to provide on 1 December 1988 the tax computations showing no chargeable income, the respondent had to make, and did make, assessments. That stand could only have been taken on the proposition that any work or exercise done by the respondent by which he is enabled to know whether or not a person has a chargeable income is the making of an assessment. The question for us to decide, therefore, was whether such a proposition was right.

The appellants relied mainly on two authorities. One of them was *The King v. The Deputy Federal Commissioner of Taxation for South Australia; ex parte Hooper* [1926] 37 CLR 368, a decision of the High Court of Australia. The statute concerned was the Income Tax Assessment Act 1922-1924, s. 35 of which placed a statutory duty on the Commissioner to "make assessments": p. 374. The case was cited for the following dictum of Isaacs J at pp. 372 and 373 on the nature of an assessment:

> Before indicating in detail the successive provisions of the Act, one general deduction from those provisions may be stated, a deduction possibly obvious, but very necessary to remember. It is as to the nature of an assessment. An "assessment" is not a piece of paper: it is an official act or operation; it is the Commissioner's ascertainment, on consideration of all relevant circumstances, including sometimes his own opinion, of the amount of tax chargeable to a given taxpayer. When he has completed his ascertainment of the amount, he sends by post a notification thereof called "a notice of assessment." And then, says the Act (sec. 54), "income tax shall be due and

> payable sixty days after the service by post of a notice of assessment." The section adds that, where by amendment of an assessment additional income tax is thereby payable by a taxpayer, it is due and payable thirty days after notice of amended assessment. But neither the paper sent nor the notification it gives is the "assessment." That is and remains the act or operation of the Commissioner.

The first thing we would, with respect, say about the definition of "assessment" in the passage is that the definition will have a problem of fitting into the idea of making an assessment. As has been stated, the Commissioner had a statutory duty to make assessments. There would come a time when, in respect of a taxpayer, he would be able to say that he had made an assessment. He then, if asked, would have to show what he had made, that is the assessment. Surely he could not point to the efforts that he had made and the operation that he had executed as the assessment that he had made. The natural thing to do would be to show the result of the work, which would have to be on paper.

The second thing we would say about the passage is that it does not help to answer the question that we saw as being posed in this case. The passage is concerned to emphasize that an assessment is the work undertaken to ascertain the amount of tax chargeable and not the paper on which the ascertainment is recorded, whereas the question that we saw as being posed in this case was a wider one.

The other authority relied on by the appellants was *Lloyds Bank Export Finance Ltd v. Commissioner of Inland Revenue* [1991] STC 474, a Privy Council decision. It involved the construction of certain sections of the New Zealand Land and Income Tax Act 1954 which was consolidated in the Income Tax Act 1976. Section 19 of the 1976 Act (s. 17 of the 1954 Act) imposed a duty on the Commissioner, from the returns and other information, to "make assessments in respect of every taxpayer of the amount on which tax is payable and of the amount of that tax". Section 25 of the 1976 Act (s. 24 of the 1954 Act) provided as follows in sub-s. (1):

> (1) When any person has made returns and has been assessed for income tax for any year, it shall not be lawful for the Commissioner to alter the assessment so as to increase the amount thereof after the expiration of 4 years from the end of the year in which the assessment was made.

The circumstances giving rise to the appeal were, as related at p. 475, as follows:

> The appellants, *Lloyds Bank Export Finance Ltd* (the taxpayers), submitted the necessary returns for the years 1976 and 1977 showing small profits. However, because of substantial losses in prior years which they were entitled to carry forward and set off, the respondent (the commissioner) made determinations to the effect that no tax was payable by them in the two years in question. Some five years after the last of the two determinations the commissioner sought to assess the taxpayers to tax in respect of the above two years. The taxpayers challenged the assessments on the ground, *inter alia*, that they were statute-barred by reason of the provisions of s. 24 of the 1954 Act. Tompkins J upheld the taxpayers' objection to the assessments (see [1988] II TRNZ 733) but the Court of Appeal quashed the orders made in the High Court and declared that the commissioner was not barred by s. 25 of the 1976 Act (the re-enactment of s. 24 of the 1954 Act) from making the assessments (see [1990] 2 NZLR 154).

As stated at p. 477 a-b:

> The issue between the parties is whether the determination, to use a neutral word, by the commissioner for the years 1976 and 1977 that no tax was payable by the taxpayers constituted assessments for the purposes of s. 25(1). If they did, the commissioner accepts that the later assessments were out of time and therefore ineffective. If they did not, the later assessments were not time-barred.

The Privy Council gave an answer in the affirmative. They approved the following passage at p. 479 g-j from the judgment of Tompkins J:

> In my opinion the expression "make assessments" in the context of s. 17, means the process by which the Commissioner carries out his statutory obligation to ascertain the amount on which tax is payable and the amount of tax. I find nothing in the section, nor in the statutory scheme to justify a conclusion that the Commissioner only makes an assessment where he determines that there is tax payable. A conclusion that there is no amount on which tax is payable and that as a consequence there is no tax payable involves making an assessment from the returns and other information in his possession just as much as if the result of the assessment were to find that there was an amount on which tax was payable and consequently there was tax payable.

In the present case, notices of assessment were not issued for the three years of assessment in question because there was no chargeable income. To decide not to issue the notices of assessment, the respondent would have concluded that there was no amount on which tax was payable and that as a consequence there was no tax payable. Applying Tompkins J's definition, the respondent had made assessments. This was what the learned judge in the instant case had to say about it:

> If the consideration is to be placed on the interpretation of our section 90(1) alone on the authority of *Lloyds Bank Export Finance Ltd* it would appear that the applicant has made out its case against the respondent to get this court to issue mandamus against the respondent to compel it to issue to and caused *(sic)* to be served on the applicant notices of assessment for the years of assessment 1982, 1983 and 1984.

But the learned judge went on to say that in *Lloyd's Bank Export Finance Ltd* no mention was made of the equivalent of our s. 93, and he concluded, on the basis of s. 93, that the respondent had not made assessments for the three relevant years.

Section 93 provides as follows:

> An assessment in respect of a person shall:
>
> (a) be made in the appropriate prescribed form;
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> (b) indicate, in addition to any other material included therein, the appropriate year of assessment and the amount or additional amount of chargeable income and the tax charged thereon or the amount of tax or additional tax, as the case may be; and
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> (c) specify in the appropriate space in that form the date on which that form was duly completed,
>
> and, where that form appears to have been duly completed the assessment shall, until the contrary is proved, be presumed to have been made on the date so specified.

According to s. 93 there is formality, ritual and deliberateness in making an assessment. The prescribed form must be used. The date on which the form is duly completed must be specified in the appropriate space in the form. The date is important as the date on which the assessment must be presumed to have been made. Any other determination as to chargeable income or tax liability made in some other medium, or for some purpose other than for completion of the assessment form, or made before that date, is not, or is not yet, the making of an assessment. Even if the form is completed, no assessment will have been made until the date is specified. Any work, inquiry or calculation done before that would be not the making of the assessment but an effort made towards the making of the assessment, which is the completion of the form coupled with the dating of it, and the assessment that is made comprises the matters indicated in the form as stated in para. (b) of the section.

The appellants did not before us argue against the learned judge's resort to s. 93. There has been no specific mention of it in the memorandum of appeal or the appellants' written outline of submission. In view of section 93 and of the fact that no question arose before us that assessment forms had been completed for the three years of assessment in question, we agreed with the learned judge that no assessments had been made in respect of those years and therefore the respondent was under no duty under s. 96(1) to have notices of assessment served on the appellants. We therefore dismissed the appeal.

We ought to add that the respondent's counsel appeared to shrink from reliance on s. 93. Neither in his oral submission before us nor in the respondent's outline of submission, nor in the notes of his submission before the judge was there any mention of the section. Whatever may have been the reason for it, it was clear to us that s. 93 provided the answer for the respondent.